



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KIAGE J.A (IN CHAMBERS)

CIVIL APPEAL (APPLICATION) NO. 249 OF 2020

BETWEEN

DAVID MUNYAE & 10 OTHERS.....APPLICANTS

AND

MUATHE MULWA & 21 OTHERS.....RESPONDENTS

(An application for leave to amend the Record of Appeal lodged on 23rd June 2020 pursuant to Section 3A & 3B of the Appellate Jurisdiction Act and Rule 44 (1) & (2) of the Court of Appeal Rules)

RULING

The applicants herein moved the Court by a motion on notice, seeking the following orders;

a) THAT this Honourable Court be pleased to grant leave to the appellants to amend the Record of Appeal filed on 2323/6/2020.

b) THAT the costs of this application do abide the result of the Appeal herein.

It is trite that the power donated to the Court by **Rule 44** of the **Court of Appeal Rules** is discretionary in nature. The principles that I consider and in the exercise of the same, unfettered though it be, are commonplace. They were stated thus in **PATRIOTIC GUARDS LTD V JAMES KIPCHIRCHIR SAMBU [2018] eKLR**;

“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.” (Emphasis added)

The motion is founded on 6 grounds on the face of it and is supported by an affidavit sworn by Gladys Gichuki, the appellants’ advocate. She deposed that the record of appeal which was filed on 23rd June 2020 had been erroneously paginated at the bottom right hand corner as opposed to the top right hand corner. The error was inadvertent and the same is curable by an amendment order given by a Judge of this Court, to enable the appellants to comply with the

Rules.

After carefully considering this matter, I am conscious that my discretion must be exercised on sound principle for the attainment of the ends of justice. **Section 3A** and **3B** of the **Appellate Jurisdiction Act** provide that it is the duty of the Court to further the overriding objective in order to facilitate the just determination of matters. In the instant application, the applicants are merely amending the numbering of the pages of the record of appeal in accordance to the requirement in the **Court of Appeal Practice Directions – Civil Appeals and Applications, 2015** which provides that all pages shall be numbered at the top right hand corner.

I am aware that there are instances where the Court can decline to exercise this discretionary power to allow amendment in favour of the applicant. Such instances include where a new or inconsistent cause of action is introduced; where vested interests or accrued legal rights will be adversely affected; where prejudice or injustice which cannot be properly compensated in costs is occasioned to the respondent. See **JOHN MUGAMBI & MUGAMBI & COMPANY ADVOCATES V KIAMA WANGAI [2021] eKLR**.

None of that obtains herein. The proposed amendment does not change the content of the appeal as it does not seek to introduce any issues or evidence hence the same will not occasion any prejudice to the respondents. Further, the applicants have complied with the requirements in **Rule 44** of the **Rules** which requires that the application for amendment be served on the respondents before or during the hearing of the application. It is telling that though served, the respondents have not filed any response, leaving the application unopposed.

In the circumstances, I allow the motion as prayed. The applicant shall file and serve the duly amended record of appeal within seven (7) days of the date hereof.

Costs of the motion shall be in the appeal.

Dated and delivered at Nairobi this 4th day of June, 2021

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR